No. 78-980

In the Supreme Court of the United States

OCTOBER TERM, 1978

GRAND TRUNK WESTERN RAILROAD COMPANY,

Petitioner,

vs.

DONALD R. BARRETT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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INDEX

PAGE

Argument 1

Conclusion 8

TABLE OF AUTHORITIES

CASES:

Alabama Power Co. v. Davis, 431 U.S. 581, 52 L.Ed.2d 595 (1977) 3

Conner v. Pennsylvania R.R., 177 F.2d 854 (D.C. Cir. 1949) 4, 5

Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 90 L.Ed. 1230 (1946) 2, 3, 4

Franks v. Bowman Transportation Co., 424 U.S. 747, 47 L.Ed. 2d 444 (1976) 4

Gregory v. Louisville & N. R.R., 92 F.Supp. 770 (W.D. Ky. 1950) *aff'd* 191 F.2d 856 (6th Cir. 1951) 5, 6

Hewitt v. System Federation No. 152, 161 F.2d 545 (7th Cir. 1947) 6, 7

Horton v. United States Steel Corp., 286 F.2d 710 (5th Cir. 1961) 6

McKinney v. Missouri-Kansas-Texas R.R., 357 U.S. 265, 2 L.Ed.2d 1305 (1958) 3, 7

Oakley v. Louisville & N. R.R., 338 U.S. 278, 94 L.Ed. 87 (1949) 3

PAGE

STATUTES:

38 U.S.C. §2021(a)(B)(i) 1

38 U.S.C. §2021(a)(B)(ii) 2

38 U.S.C. §2021(b)(1) 2

38 U.S.C. §2021(b)(2) 3

MISCELLANEOUS:

Webster's Third New International Dictionary, Unabridged (1971) 2

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THE DECISION BELOW CONFLICTS WITH THE MEANING AND SCOPE OF THE MILITARY SELECTIVE SERVICE ACT.

1. Contrary to respondent's argument (Res. 5), petitioner's position is supported by the language of the Act. The Act merely mandates that a returning veteran *"be restored"* to his pre-service position or one of like seniority, status and pay. 38 U.S.C. §2021(a)(B)(i) (emphasis supplied). To restore means to give back or to put back

into a former or original form or position. *Webster's Third New International Dictionary, Unabridged* (1971).[1] Thus, consistent with the Act, an employee only must return to a veteran those rights and that status which arose out of his pre-service employment. The employer need not duplicate an opportunity which did not exist by virtue of the veteran's position.[2]

Moreover, the requirement that a veteran must be treated as if on "furlough or leave of absence" [38 U.S.C. §2021(b)(1)] does not defeat petitioner's position. As explained in *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 287, 90 L.Ed. 1230 (1946), an employee on furlough or leave of absence may accrue benefits which arise out of his position. However, in this case respondent did not have a right to transfer crafts arising out of his switchman's position. The Record clearly indicates that not all switchmen were given an opportunity to become firemen. Thus, while respondent may have been a qualified former C-2 fireman, his qualifications did not arise out of his pre-service employment as a switchman. In fact, assuming that respondent did not enter service, respondent would have been offered the position even if he did not work for petitioner in any capacity at the time of the job opening.

Respondent's reliance on the statutory mandate to give a returning veteran "such status in [his] employment as [he] would have enjoyed if [he] had continued in such

[1] In *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 286 n. 10, 287 n. 11, 90 L.Ed. 1230 (1946), the Court relied on dictionary definitions in construing the Act.

[2] The statute also uses the language "reemployed" in connection with an employer's duty under the Act. However, that language only has relevance to situations in which a veteran cannot return to his former position because of a service-related disability. 38 U.S.C. §2021(a)(B)(ii). Such is not the case here.

employment continuously" [38 U.S.C. §2021(b)(2)] is unavailing in light of legislative history. Subsection (b)(2) was added to codify the "escalator principle" enunciated in *Fishgold, supra,* and restated in *Oakley* v. *Louisville & N. R.R.*, 338 U.S. 278, 283, 94 L.Ed. 87 (1949). [*McKinney* v. *Missouri-Kansas-Texas R.R.*, 357 U.S. 265, 271, 2 L.Ed.2d 1305 (1958)]. Under the principle's dictates, a returning veteran moves only in accordance with "the terms and conditions affecting that particular employment." *Oakley, supra* at 283, 94 L.Ed. 87. When inducted, respondent was a switchman, and as such he had absolutely no right to transfer to the fireman's craft.

Clearly, the Act only protects rights arising out of the veteran's pre-service employment and nothing more. Contrary to respondent's statement (Res. 5), the fact that respondent lacked any right by virtue of his pre-service switchman's position to transfer crafts bears the utmost relevance to this case. Indeed, it is dispositive of the issue here. Furthermore, respondent's contention that this case stands in a posture similar to *Alabama Power Co.* v. *Davis,* 431 U.S. 581, 52 L.Ed.2d 595 (1977) is incorrect. First, the pension plan in *Alabama Power* constituted a benefit which clearly arose out of Davis' pre-service employment. Secondly, the plan was given retroactive application, in that it covered employees who had completed one year's service with the company. 431 U.S. 581, 582 n.1, 52 L.Ed.2d 595. Thus, the plan operated in practical effect as if it had been established on Davis' first anniversary with Alabama Power—long before his induction into military service. 431 U.S. 581, 582, 52 L.Ed.2d 595. Both factors make *Alabama Power* readily distinguishable.

The seventh circuit decision improperly extends the Act's protective umbrella to prevent the loss of opportunities because of military service. Nothing in *Fishgold, supra* (Res. 5, n.5) or any other decision supports that

position, and, indeed, *Fishgold* dictates the opposite conclusion. Furthermore, respondent's affirmative answer to petitioner's hypothetical (Res. 5, n.5) does not follow from his citations. In *Conner* v. *Pennsylvania R.R.*, 177 F.2d 854 (D.C. Cir. 1949), unlike the present case, the veteran had a clear right resulting from the collective bargaining agreement and established employer practices to transfer positions. 177 F.2d 854, 859. Moreover, *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 47 L.Ed.2d 444 (1976) concerned the extent of relief available to deserving Title VII litigants. The citations to veterans' rights cases (*Id.* at 784) assumed, in line with the opinion itself, that the veterans were entitled to relief. Since the issue presented by petitioner's hypothetical and this case is whether respondent is entitled to relief, respondent's citations merely beg the question instead of answering it.

The decision below is clearly erroneous and merits review.

2. Respondent cannot reconcile the conflict among circuit decisions. In *Conner* v. *Pennsylvania R.R.*, 177 F.2d 854 (D.C. Cir. 1949), defendant veterans, employed prior to service as freight trainmen, were allowed to transfer to passenger trainmen positions and were given seniority dates ahead of plaintiff passenger trainmen. The court grounded its ruling on the fact that under the collective bargaining agreement, defendants had a clear right to transfer positions. 177 F.2d 854, 857-59. Respondent argues that nothing in *Conner* suggests that the result would have been different if the right to transfer existed independent of the agreement (Res. 7). Yet, respondent points to nothing in *Conner* indicating that the result would have been the same. Clearly, respondent cannot hypothecate a new situation in order to reconcile conflicting decisions.

Moreover, respondent incorrectly argues that he had a right to transfer which existed independent of the collective bargaining agreement (Res. 7). Respondent had, at very best, an opportunity to transfer, and unlike *Conner*, this opportunity had absolutely no connection to his pre-service position as switchman.

Respondent erroneously states that *Conner* refused to consider the collective bargaining agreement because the Act, by itself, protected the veterans (Res. 8). Rather, the court refused to consider whether the collective bargaining agreement was binding on plaintiffs, *i.e.*, the persons bumped by the returning veterans. 177 F.2d 854, 858. Indeed, after extensively considering the agreement, the court found that it gave the veterans the right to transfer positions and, consequently, the Act required that the veterans be properly restored that right.

Similarly, *Gregory* v. *Louisville & N. R.R.*, 92 F. Supp. 770 (W.D. Ky. 1950) *aff'd* 191 F.2d 856 (6th Cir. 1951) is irreconcilable. In *Gregory*, upon plaintiffs' return from duty, they were allowed to transfer crafts and were given seniority dates just ahead of persons of lesser seniority who transferred crafts during plaintiffs' absences. 92 F. Supp. 770, 772, 774. Plaintiffs brought suit after a subsequent collective bargaining agreement revised their seniority to the date on which plaintiffs were actually regularly assigned to the new craft. Noting that persons of greater and lesser seniority were allowed to transfer crafts during the *Gregory* plaintiffs' military absence, respondent erroneously concludes that the transfers were based on managerial discretion (Res. 8). However, the mere fact that persons of various seniority levels were allowed to transfer crafts simply demonstrates the extent of the employer's need for transferees while plaintiffs were in service, and not the reason for the choice of particular transferees. Not only did the court not "focus" (Res. 8) on the issue of managerial discretion, it did not mention or even intimate that the issue of managerial discretion had any bear-

ing on its decision. Instead, the decision focused on plaintiffs' lack of any right to transfer. Recognizing that plaintiffs had no right to transfer crafts by virtue of their pre-service positions, the court rejected plaintiffs' claim for retroactive seniority benefits. 92 F. Supp. 770, 776-77. The *Gregory* court also noted that the "great presumption or strong probability" that plaintiffs would have transferred had they remained at home did not entitle them to the Act's protections. 92 F. Supp. 770, 777. Consequently, respondent's reliance on the fact that in this case he would have been offered an opportunity to transfer is misplaced.

In *Horton* v. *United States Steel Corp.*, 286 F.2d 710 (5th Cir. 1961), the court recognized that managerial discretion played a role in the denial of veteran's benefits. However, after noting that the collective bargaining agreement has "substantial, if not decisive, significance" in determining veterans' rights (286 F.2d 710, 712), the court also stated that the veteran had no enforceable right to transfer. *Id.* at 713. In this case, the court of appeals improperly bestowed on respondent a right which did not belong to him.

Finally, respondent's purported distinction of *Hewitt* v. *System Federation No. 152,* 161 F.2d 545 (7th Cir. 1947) is incorrect. In *Hewitt,* the court stated that plaintiff, in his pre-service position as a car cleaner, had no right to transfer to the carmen helper position. In this case, respondent argues that qualified former C-2 firemen had the right to transfer. However, C-2 firemen did not have a right to transfer; rather, they were given an opportunity to transfer. Moreover, in his pre-service position, respondent was employed as a switchman, not a C-2 fireman, and respondent's lost opportunity to transfer did not arise out of his switchman's position. Indeed, many of the C-2 firemen were not employed in any capacity by petitioner at

the time the opportunities arose. Thus, *Hewitt* stands at odds with the decision below.[3]

The irreconcilable conflict among circuit decisions justifies the granting of certiorari.

3. This case involves a proper exercise of managerial discretion. While the factual setting in *McKinney* v. *Missouri-Kansas-Texas R.R.,* 357 U.S. 265, 2 L.Ed.2d 1305 (1958) involved the exercise of managerial discretion respecting a veteran's "fitness and ability", *McKinney* certainly recognized the broad concept of managerial discretion. The Court stated:

> The statute manifests no purpose to give to the veteran a status that he could not have attained *as of right, within the system of his employment,* even if he had not been inducted into the Armed Forces but continued in his civilian employment.
>
> Thus, on application for re-employment a veteran is not entitled to demand that he be assigned a position higher than that he formerly held when promotion to such a position depends, not simply on seniority or some other form of automatic progression, *but on the exercise of discretion on the part of the employer.*

375 U.S. 265, 272, 2 L.Ed.2d 1305 (emphasis supplied). Petitioner here retained absolute discretion respecting transfers of personnel to the fireman craft, and it was not bound to exercise that discretion in favor of respondent or anyone else.

This case presents an excellent opportunity to define the boundaries of the principle of managerial discretion. It

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[3] Respondent assumes *"arguendo"* (Res. 9) that the collective bargaining agreement covering switchmen does not bestow a right to transfer. Such an assumption is unnecessary, for clearly no such right existed under the agreement. Neither respondent nor the seventh circuit could ever identify a right to transfer under the agreement.

ultimately questions whether an employer can use an employee's absence due to military service as the sole and precise ground for a particular exercise of managerial discretion. In this light, the case truly merits Supreme Court review.

CONCLUSION

For the foregoing reasons, petitioner Grand Trunk Western Railroad Company urges this Most Honorable Court to issue a writ of certiorari to review the judgment and opinion of the seventh circuit.

Respectfully submitted,

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